RAMASUNDRAMOORTHY PERMALU v. GREGORY YUSRAN & ASSOCIATES

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
RHODZARIAH BUJANG JCA
HAS ZANAH MEHAT JCA
[CIVIL APPEAL NO: B-03(IM)(NCVC)-21-03-2019]
17 JUNE 2020

CIVIL PROCEDURE: *Judgments and orders – Judgment in default – Setting aside – Delay in application – Whether timeline must be mandatorily complied with – Whether delay satisfactorily explained – Whether there was defence on merits raised – Whether defence ought to be allowed to be tested against full weight of evidence*

The respondent, a law firm, having wanted to expand its legal portfolio to include motor insurance claims, appointed the appellant as a legal assistant for this purpose, based on the appellant's representation of having the necessary expertise and skill. The respondent provided the funds as and when required by the appellant and according to the number of files opened by the appellant. The respondent claimed that he had lent the appellant a total sum of RM1,620,730. The respondent claimed that on 30 September 2014, the appellant suddenly stopped coming to work and despite efforts on their part to contact the appellant, the appellant failed to return to work. Consequently, the appellant's services were terminated. Following an internal investigation, the respondent found that the appellant had failed to carry out his obligations as agreed and that the respondent had suffered loss from the files handled or managed by the appellant. The respondent thus initiated proceedings against the appellant seeking the refund of RM1,620,730 given as a loan. The respondent obtained a judgment in default against the appellant for the sum claimed. The appellant sought to set aside the judgment in default. However, the application was dismissed on the basis that the judgment in default was regular, there was unaccountable delay in the application and that there were no merits in the appellant's defence. The appellant was subsequently made a bankrupt. Hence, this appeal on the issues (i) whether the delay had been reasonably accounted for; and (ii) whether there was a defence on merits raised. The appellant contended that he was initially paid a monthly salary and subsequently, on commission basis. The appellant was appointed as 'share partner bersama pihak yang membawa kes (agents)' and was to be paid on a commission basis. An agreement was drawn up with provisions for the respondent to provide the necessary 'modal'. The appellant claimed that the money from the respondent was spent on medical and specialist reports, staff remuneration and his own costs. The 'modal' was not a lump sum amount, instead, it was given depending on the appellant's monthly status reports put

together from the reports of the agents. The appellant contended that in August 2014, the respondent appointed a new legal assistant to handle the motor accident claims, to which the appellant had no prior notice. The appellant thus left the respondent in October 2014, purportedly with the respondent's consent, to set up his own legal practice.

Held (allowing appeal with no order as to costs)
Per Mary Lim JCA (for the majority):

(1) The appellant's explanation on the difficulties encountered both in accessing documentation and obtaining assistance of corroborative evidence were actually borne out. The documentation is the property of the respondent. The appellant's explanation that he was attempting to resolve the matter with the respondent was also reflected in the letters sent to the respondent, but the respondent did not reply to any of them and no explanation was offered by the respondent. The peculiar circumstance that the appellant found himself in, with the difficulties faced, were not imagined and the letters sent contemporaneously confirmed the action taken by the appellant at the material time. The delay had thus been satisfactorily accounted for. (paras 15 & 16)

(2) Although the appellant was responsible for repaying the cash advances, the respondent had already been repaid in full through the collections and deductions systems as explained by the appellant and supported by corroborative documentary evidence. The appellant's version of the facts, numbers and calculations were also backed up by the affidavit of Silvarajoo, the main agent who was responsible for sourcing motor-vehicle accident cases and referring them to the respondent. Further, the extensive provision under cl. 18 on how the fees and disbursements and recovery of any loans to clients would be settled from any 'compensatory award' lent much credence to the appellant's version of the facts and more importantly, to his defence. (paras 27, 34 & 35)

(3) The appellant's explanation that all compensation awards or monies were paid to the respondent and into the respondent's accounts and it was the respondent's principal partner, as signatory to the respondent's account, who would make all the necessary deductions including for its own cash advances before issuing any payment to the client, was entirely plausible and made perfect sense. According to the appellant's record and understanding, that was being done all along leaving nothing outstanding or due from the appellant. (para 37)

(4) The cash advances were intended to be used and were used to set up the motor accident insurance portfolio which was housed in the respondent's firm and premises, using the respondent's staff and where all files or cases were the property of the respondent and the clients were

A the respondent's. The correspondence related to the clients handled by the appellant were all on the respondent's letterhead. The sum claimed was advanced over a period of nearly two years during which time, there were settlements and awards from which the respondent received a 'commission' apart from the repayments for the cash advances. (para 39)

B **(5)** The appellant had thus satisfactorily displayed a good defence of merit and must be allowed to defend the claim brought against him by the respondent and upon which the default judgment was entered. The defence must be allowed to be tested against the full weight of evidence and be fully dealt with in a trial. (para 41)

C **Per Rhodzariah Bujang JCA (dissenting):**

(1) The appellant only filed his application to set aside the judgment about two years, one month and 22 days after it was entered, and after the receiving and adjudication order had been made against the appellant, D that too, after a lapse of about ten months from the order. There was no given or an acceptable explanation deposed in his affidavit why he waited so long to act even after being made a bankrupt for the judgment debt. The timeline stipulated under O. 43 r. 13 of the Rules of Court 2012 ('ROC') is mandatory since the word used is 'shall' and thus the court has no discretion to excuse its non-compliance unless the appellant E filed an application for extension or abridgment of time. Since there was no such application filed, the indolence of the appellant was fatal to the application. (para 46)

(2) It was not necessary for the defendant to personally receive the writ and F statement of claim in order for the service of the documents to be proper. The appellant had not satisfied the court that he had not received the writ and statement of claim. The service was effected at the appellant's last known address and hence, the service of the writ and statement of claim was proper. The judgment in default was a regular judgment. (paras 47-49)

G *Obiter*

(1) Although the ROC did not expressly provide for a proposed defence to be exhibited in the affidavit, such practice, in an application as present, would breed certainty on what the proposed defence would be, and not H just guesswork from the complaints levelled against the claim deposed in the affidavit in support of the application. It is an opportune time to make the practice mandatory. (para 53)

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Case(s) referred to:

Adzmi Ali & Anor v. Mohd Isa Kasad [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 SC ***(refd)***
Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1978] 1 LNS 15 FC ***(refd)***
Chung Wei Meng v. Perbadanan Nasional Berhad (Civil Appeal No: W-02(IM)-1216-07-2016 & W-02(IM)1217-07-2016) (Unreported) ***(refd)***
Evans v. Bartlam [1937] BC 473 ***(refd)***
Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 SC ***(refd)***
Ho Miaw Ling v. Singapore Island Country Club [1997] 1 SLR (R) 276 ***(refd)***
Kwong Yik Bank Bhd v. Sa'adiah Masan [1992] 1 LNS 52 HC ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***
Teskey v. Paz [1999] OJ No. 4977 ***(refd)***
Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 10 r. 1(1), O. 12 r. 4(a), O. 13 r. 8, O. 42 r. 13

Rules of Civil Procedure [Canada], r. 16.03(4)

For the appellant - Dzaki Ezhar Bahar; M/s Krish & Kiew
For the respondent - Shamesh Jeevaretnam; M/s Jeeva Partnership

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-526-10-2015 (overruled).]

Reported by S Barathi

JUDGMENT

Mary Lim JCA (majority):

[1] Before the High Court, the appellant was unsuccessful in his appeal against the dismissal of his application to set aside a judgment in default obtained by the respondent on 18 January 2016 and that the appellant be given leave to extend time to file a memorandum of appearance and defence. Upon due consideration of the submissions, reasons for the learned Judicial Commissioner's decision and the record of appeal, by majority, the appeal was allowed. These are our reasons in full.

Background

[2] The respondent is a law firm comprising at the material time six advocates and solicitors with areas of practice in banking, property, corporate and insurance. In 2012, the respondent decided to expand its area of practice to include motor insurance. Towards this end, on 3 October 2012, the respondent appointed the appellant as a legal assistant; it seemed after the appellant had given the respondent's senior partner the impression that he was experienced in the field of motor insurance.

[3] The respondent claimed that it had provided the appellant a total of RM1,620,730 for the expansion. The respondent claimed that the appellant ceased turning up for work from 30 September 2014. After three letters had been issued requiring the appellant to report for work, the appellant's appointment was terminated. Following an internal investigation, the respondent found that the appellant had failed to diligently carry out his duties as a result of which it suffered loss. The respondent initiated proceedings against the appellant seeking a refund of RM1,620,730 given as a loan, general damages and interest.

[4] On 18 January 2016, a judgment in default of appearance was entered against the appellant for the sum of RM1,620,730 together with interest. On the strength of this judgment, the respondent commenced bankruptcy proceedings against the appellant.

[5] On 23 February 2018, the appellant filed an application to set aside the judgment in default, citing that the judgment was irregular, for time to enter appearance and filing of defence and for the receiving and adjudication orders dated 6 April 2017 to be annulled.

[6] The application was dismissed on the basis that the judgment in default was regular, that there was unaccountable delay in the application and that there were no merits in the defence.

Our Decision

[7] Pursuant to O. 13 r. 8 of the Rules of Court 2012, the court may, on such terms as it thinks just, set aside or vary any judgment entered pursuant to this order. Where the default judgment was entered regularly, case law has been clear that the default judgment may only be set aside upon satisfying the court that there is a good meritorious defence. See for instance the decisions of the Federal Court in *Bank Bumiputera Malaysia Bhd v. Majlis Amanah Ra'ayat* [1978] 1 LNS 15; [1979] 1 MLJ 23; Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 CLJ 328; [1994] 1 MLJ 312; *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565; *Adzmi Ali & Anor v. Mohd Isa Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37; [1987] 2 MLJ 199; and *Kwong Yik Bank Bhd v. Sa'adiah Maslan* [1992] 1 LNS 52; [1994] 2 MLJ 830.

[8] The issue of the regularity of the judgment in default was not pursued in this appeal although there were written submissions to this effect. For the record, we find the judgment in default to be regular, in which case, the issue of the merits of the defence becomes relevant and, because of the time lapse between the default judgment and the application to set aside, the reasons for such delay. We focused thus on the two remaining issues – whether the delay had been reasonably accounted for and whether there was a defence on the merits raised. The law is trite and we have no intention to rehash the sound principles underlying the exercise of discretion in O. 13 r. 8; that a regular judgment will not be set aside unless a defence of merit is established.

[9] First, the matter of delay. From the submissions of the respondent before us, this issue was not canvassed. Apart from the regularity of the default judgment, the respondent was really concerned only with the issue of the defence or lack of one, that "from the affidavits filed, there is no proposed defence was filed by the defendant to suggest that they have a meritorious defence". At the High Court, the respondent did submit that the appellant was "lackadaisical when he received the summons" and that he "must not be given an opportunity at this late (*sic*) state ie, after two years seven months to set aside the judgment which is regularly obtained." This is also a matter of complaint in the respondent's affidavit in reply – see para. 13.

[10] Regardless, the question is whether there is delay, and has it been accounted for. The certificate of non-appearance is dated 18 January 2016 and the judgment in default was entered on that same date.

[11] The learned JC referred to para. 15A of the appellant's submissions where the appellant explained that after he had left the respondent's firm around 31 October 2014, he had difficulty in obtaining supporting affidavits or evidence as none of the agents were on speaking terms with him. It was only upon the bankruptcy proceedings that one of the agents stepped forward to affirm an affidavit in support for him and that was in May 2017. He also had no access to documents having left the employment of the respondent. Again, it was only in May 2017 that he managed to obtain some assistance.

[12] The appellant's explanation was rejected. The learned JC found the reasons given, unreasonable. According to the learned JC, it was not acceptable for the appellant to blame others "in not helping him solve his problem"; that there was no reasonable explanation for the two years seven months inordinate delay. Further, the plea was "nothing more than attracting this Honourable Court to be more sympathetic with such scenario".

[13] We, on our part, disagree finding ourselves satisfied with the reasons and explanations given.

[14] The record shows that the appellant had filed an application to set aside amongst others, the default judgment, on 8 May 2017 – see encl. 8. It is unclear what happened to that application but what is clear is that the appellant filed another application (encl. 15), similar to encl. 8 and it is the decision in respect of that application which is the subject of the appeal before us. Enclosure 15 was filed on 23 February 2018. Together with the application were three affidavits, two of which were filed by the appellant himself (encls. 16 and 18) and another affirmed by one Silvarajoo a/l Appavoo (encl. 17). These affidavits were the same affidavits filed in support of the earlier application in encl. 8. The respondent filed an affidavit in reply (encls. 19) to which the appellant filed two more affidavits in reply (encl. 20 and 21); the last affidavit in reply was to furnish evidence of the sanction issued by the Insolvency Department.

[15] These affidavits must be read and carefully evaluated for otherwise, how is one to exercise the discretion involved in deciding whether or not to set aside the judgment in default; whether delay has been adequately explained, and the question of merit of defence. Having done precisely that including examining the exhibits attached, we found the delay satisfactorily accounted for; that the appellant had taken various steps to resolve the matter with the respondent including negotiating with the respondent but, was unsuccessful. His was not a case of an indolent litigant who did not warrant the aid of the court. His explanation of the difficulties encountered both in accessing documentation and obtaining assistance of corroborative evidence are actually borne out. The documentation is the property of the respondent since the appellant was at all times, a legal assistant of the respondent. This may be seen from the terms of the contract for services signed between the parties, a matter which we will return to for more discussion shortly. The appellant's explanation that he was attempting to resolve the matter with the respondent is also reflected in the letters sent to the respondent. See the letters dated 26 July 2016; 6 September 2016 and 8 March 2018 (p. 255 to p. 259 of the record of appeal) were all received by the respondent; but the respondent did not reply to any of them; and there is no explanation offered by the respondent.

[16] Contrary to the learned JC's view that the appellant was putting blame on others and that he was merely seeking the sympathy of the court; that is in fact far from the truth. The appellant was simply telling his side of the matter, offering evidence in support; and it was the duty of the learned JC to examine those evidence which he failed to do. We, as we have said, are satisfied with the explanation on the delay and of the steps taken by him. The peculiar circumstances that the appellant found himself in, with the difficulties faced are not imagined and the letters sent contemporaneously confirm the action taken by the appellant at the material time. We therefore, are satisfied that delay has been satisfactorily accounted for.

[17] More critically is the matter of whether the appellant had put up a good defence on merits. The learned JC understood the defence to be that the respondent was not satisfied with the appellant's work and had a grudge against him; that there was misappropriation of the firm's funds by others; and that there was an element of fraud and cheating in how the respondent had obtained judgment. After examining the affidavits, the learned JC found none of these defences to be of merit; that the appellant ought to have been made a police report and since he did not, chose not to believe him. Again, we must disagree.

[18] First, the nature of the respondent's claim, as pleaded – see pp. 40 to 44 of the record of appeal.

[19] The respondent who wanted to expand its legal portfolio to include motor insurance claims appointed the appellant specifically for this purpose, supposedly based on the appellant's representation of having the necessary expertise and skill. An agreement was drawn up between the parties on 3 October 2012 (contract for service) where it was *inter alia* agreed that:

(i) the appellant would take all reasonable efforts to develop the motor insurance work in the respondent's firm;

(ii) the appellant would contribute towards the firm's funds at its branch at Petaling Jaya for the payment of bills at that branch;

(iii) the respondent would give all necessary financial assistance for the development of the motor insurance work but for all intents and purposes, that assistance is to be treated as a personal loan to the appellant which the appellant must repay by a fixed date;

(iv) in return for the appellant's efforts, the appellant is allowed to retain as his commission, a portion of fees collected from the clients.

[20] The respondent provided the funds as and when required by the appellant and according to the number of files opened by the appellant. The respondent claimed that he had lent the appellant a total sum of RM1,620,730. On 30 September 2014, the appellant suddenly stopped coming to work. Despite efforts on their part to contact the appellant including sending three letters asking the appellant to return to work, the appellant failed to report for work; and his services were then terminated. Following an internal investigation, the respondent found that the appellant had failed to carry out his obligations as agreed and that the respondent had suffered loss from the files handled or managed by the appellant. The respondent's reliefs were for the immediate payment of the sum of RM1,620,730 together with general damages, interest and costs. In the respondent's affidavit in reply (encl. 19 at pp. 94 to 99 of the record of appeal), the respondent reiterated that its claim of RM1,620,730 was for breach of agreement and/or understanding – see para. 11.

[21] At this point in time, the merits of the appellant's defence to the respondent's claim can only be ascertained from the affidavits filed and exchanged, namely:

(i) appellant's affidavit in support (encl. 16 at pp. 70 to 79);

(ii) appellant's third supplementary affidavit (encl. 18 at pp. 86 to 93);

(iii) appellant's affidavits in reply (encls. 20 & 21 at pp. 100 to 105);

(iv) respondent's affidavit in reply (encl. 19 at pp. 94 to 99);

(v) affidavit by Silvarajoo a/l Appavoo (encl. 17 at pp. 80 to 85).

[22] This was the appellant's version of the matter. According to him, he was a legal assistant with the respondent from June 2009 to October 2014. Initially, he was paid RM5,500 per month but from July 2011, he was paid on a commission basis. In October/November 2011, Gregory Santiago, the principal partner of the respondent and the appellant discussed going into motor insurance claims with the appellant appointed as "share partner bersama pihak yang membawa kes (agents)" where they would be paid on a commission basis of 10:10:10. An agreement was drawn up with provisions for the respondent to provide the necessary "modal". All this took place at the respondent's branch office at Kelana Jaya.

[23] Under this arrangement, the respondent brought in two agents, Suresan a/l Murugesan and Raajip while the appellant brought in Silvarajoo a/l Apavoo. The "modal" which was provided by the respondent was to "mendapatkan kes-kes dan sebenarnya akan diberikan kepada agents untuk mendapatkan kes" and for the agents to spend on:

(i) pembayaran pihak polis;

(ii) pembayaran kos perubatan klien;

(iii) pembayaran loan klien;

(iv) pembayaran agent fee.

(see para. 4(h) of affidavit in support at p. 72 of the record of appeal). The appellant claimed that he spent the money from the respondent on medical and specialist reports; staff remuneration, and his own costs. The appellant explained that the 'modal' was not given as a lump sum; the amount given depended on appellant's monthly status reports put together from reports from the agents. Apparently, the respondent gave a monthly average of RM71,400 and from November 2011 till August 2013, gave a total sum of RM1,632,000.

[24] The working relationship between the parties was good until early September 2013 when upon his return from India, he was alleged to have misused or misappropriated (menyeleweng) the 'modal'. In August 2014, the respondent appointed a new legal assistant named Hemashri Mohney to handle the motor accident claims. The appellant claimed he had no prior notice of this. Things escalated and the appellant left the respondent in October 2014 after informing them that he was setting up his own legal practice. The appellant claimed that he had the consent of the respondent to leave the firm. He thus refused to return when the respondent wrote asking him to return to work. In any case, he took the position that the respondent was in breach of the agreement.

[25] On the matter of paying back, the appellant explained that together with his agent, he handled over 140 cases out of which 50 cases had been resolved by the time he left the firm in October 2014. Accepting that about 20 files may have been transferred out by the agents, the 140 files brought in a total award of RM1,600,000. This sum was paid into the respondent's account with Gregory Santiago as its signatory and the respondent would then deduct and recoup its 'modal' from such payments. In the appellant's estimation, the respondent would have recouped over RM700,000. A further sum of around RM1.2 million would have been recouped when the 50 files left by the appellant were handled or managed by Hemashri leaving thus nothing outstanding or due from the appellant.

[26] We do not see any evaluation of these matters, especially against the exhibits tendered; and this becomes more prominent when we ourselves evaluate all the pieces of evidence before the High Court. One of those pieces of evidence which obviously slipped the scrutiny of the learned JC is the supplementary affidavit of Silvarajoo a/l Appavoo (Silvarajoo) affirmed on 16 May 2017 (see encl. 17 at pp. 80 to 85 record of appeal). Broadly, this is what Silvarajoo said in his affidavit.

[27] He confirmed that there was an arrangement between the respondent, appellant and himself for claims arising from motor-vehicle accidents. Under the arrangement, the respondent would provide the financial and logistical support, the appellant will do the legal work while Silvarajoo, as the main agent with two sub-agents, Maya and Madhu will source motor-vehicle accident cases and refer them to the respondent. According to Silvarajoo, the respondent provided the 'modal' to be spent as follows:

(i) loan client;

(ii) kos perubatan klien di hospital;

(iii) kos pembelian kes;

(iv) pembayaran untuk polis/staff hospital;

(v) entertainment sub agents/saya/polis/staff hospital;

(vi) kos pentadbiran saya sendiri.

[28] Silvarajoo averred that he was paid 10% commission from every award; we would understand that to be from every successful claim as he went on to explain that for every client who left or if there was a loss (kes telah hilang klien ataupun mengalami kerugian), he would replace with another client. This arrangement worked well from January 2012 to July 2013 where a total of RM850,000 was drawn from the 'modal' on an average of RM50,000 per month. On top of the RM850,000, Silvarajoo confirmed that he had also borrowed from the respondent by taking from the 'modal', RM67,000. Silvarajoo gave the respondent monthly reports on the status of expenditure. Apparently, the respondent suddenly stopped providing funds

in September 2013 and that had severe ramifications in the supply chain (keseluruhan supply line musnah). This led to losses. Silvarajoo claimed that it was the respondent who 'sabotaged' his own business.

[29] Silvarajoo further averred that the respondent's claim of RM1,603,200 was a fraudulent claim. He explained that between June 2013 and 31 October 2014; over 20 cases were resolved with the full knowledge of the respondent and all awards or monies were paid into the respondent's account where its principal partner, Gregory was the sole signatory. The respondent would deduct from such monies received the sum payable for its fees before paying the balance to the clients. Under such an arrangement, the respondent would have thus received the return of its 'modal'. Since he and his sub-agents had referred at least 92 files to the respondent's firm (exh. "S-1"), as at 31 October 2014, the total award stood at RM720,000. This meant that the respondent would have recouped about RM220,000 alone from this sum (see para. 12(iv) of his affidavit). Then, there were the 50 to 55 cases referred by him but handled by the respondent's new lawyer, Hemashri Mohney from 31 October 2014 to October 2015. The total award under these cases would have been around RM1.2 million out of which the respondent ought to have been able to recoup a further sum of RM600,000 in which case, the respondent's claim of RM1.6 over million was false and/or fraudulent.

[30] The respondent filed one affidavit in reply (encl. 19 at pp. 94 to 99 of the record of appeal) and while it responded to the appellant's affidavit in support and third supplementary affidavit dated 16 May 2017 (encls. 16 and 18), it did not at all respond or made any reference to Silvarajoo's affidavit (encl. 17). This is extremely important but it was not dealt with or even commented on by the learned JC.

[31] Apart from denying the appellant's allegations which the respondent claimed were bare allegations, the respondent claimed that the appellant had misconstrued (salah tafsir) its claim, and proceeded to reiterate its claim as appearing in the statement of claim; allege that the application would "unnecessarily delay the plaintiff's right to the amount owed by the defendant and further escalate cost".

[32] Thus, in a nutshell, the respondent was suing the appellant for a refund of the cash advances that it had given the appellant under the contract for service dated 3 October 2012 – see p. 236 of the record of appeal. And, in essence, the defence is that the cash advances have been repaid in full, through a system of deductions from compensation and awards received.

[33] Without delving into the merits of the claim or the defence, the respondent's case is that it had given the appellant these cash advances in order to "develop, manage and build the motorcar accident case portfolio including granting interest-free loans to client – see definition at cl. 2.2. Under cl. 4.1.3, the appellant would employ such persons and/or personnel

necessary for the management and running of the portfolio while under cl. 4.1.5, the appellant would manage and be responsible to collect all loans granted to the clients.

[34] Although the appellant was responsible for repaying the cash advances – see cl. 4.1.9, he explained that through the collections and deductions system, the respondent has already been repaid in full. The appellant had explained his mathematical calculations offering the list of clients and the awards received as corroborative documentary evidence. His version of the facts, his numbers, and his calculations are also backed up by the affidavit evidence of Silvarajoo.

[35] Then, again without making any finding on the substantive merits of his defence, we notice that there is an extensive provision under cl. 18 on how fees and disbursements and also recovery of any loans to clients will be settled from any "compensation award". This seems to lend much credence to the appellant's version of the facts and more importantly, to his defence. The term "compensation award" is defined in cl. 2.1 as the damages and payments agreed to be paid by way of settlement or as awarded by the courts in their judgment or offered paid and accepted as compensation by the clients (of the motor accident case portfolio) in settlement of the claims or any other such payment or settlement. Essentially, under cl. 18.1.1, before releasing any award to the client from the client's account in the respondent firm, the appellant is required to deduct or collect directly from the compensation award any loan or advance that may have been granted to the client out of the cash advances given by the respondent. In other words, before the client receives the compensation award, all loans, fees and disbursements must be settled first; and such settlement will be way of direct deductions from the award.

[36] In his third supplementary affidavit (p. 100 of the record of appeal), the appellant set out the calculations upon which he asserted that the respondent had already recouped its monies; and that his whole explanation would be borne out by the records kept by the respondent itself. Those records included the award letters from the insurance companies; e-payments by the insurance companies; the respondent's fees for each file; and the respondent's bank statements and proofs of payments to clients.

[37] In our view, the appellant's explanation that all compensation awards or monies were paid to the respondent and into the respondent's accounts (clients' account) and it was the respondent's principal partner, as signatory to the respondent's account who would make all the necessary deductions including deductions for its own cash advances before issuing any payment to the client, is entirely plausible and makes perfect sense. And, according to the appellant's record and understanding, that was being done all along leaving nothing outstanding or due from the appellant.

[38] Both the appellant and Silvarajoo have alleged that there was fraud involved but have not quite explained what the fraud or wrong-doing was. We, on our part, view with grave concern the contract for service surrounding the appellant's appointment, the terms of the appointment, how the cash advances were given, why they were given, what or how the cash advances were utilised especially in the manner as claimed by the appellant and by Silvarajoo; that loans, though interest-free, were being given to clients of motor accident insurance claims for various use or purposes; and the whole system of the use of agents and sub-agents to bring in files, cases or clients. We are concerned with the propriety and validity of such arrangements; and whether a claim founded on such contractual arrangements are at all recoverable in law.

[39] Another point that struck us was how the cash advances became a personal loan to the appellant given that the advances were intended to be used and were used to set up the motor accident insurance portfolio. That portfolio was housed in the respondent's firm and premises, using the respondent's staff and where all files or cases were the property of the respondent and the clients were the respondent's. We noticed too, that the correspondence related to the clients handled by the appellant were all on the respondent's letterhead. Taking all these into consideration and assuming the respondent had advanced the sum claimed, it was advanced over a period of nearly two years during which time, there were settlements and awards from which the respondent received a "commission" apart from the repayments for the cash advances.

[40] All these matters are serious issues and substantive defences of merit which cannot be given such short shrift by the learned JC as amounting to naught. The learned JC did not even take into account Silvarajoo's supporting affidavit which was not challenged by the respondent; or even addressed. In our regard, the learned JC had wholly misapprehended the respondent's claim and the defences raised.

[41] The appellant has thus satisfactorily displayed a good defence of merit and he must be allowed to defend the claim brought against him by the respondent and upon which a default judgment was entered. That defence must be allowed to be tested against the full weight of evidence and be fully dealt with in a trial.

[42] Accordingly, we allow the appeal with no order as to costs and set aside the decision of the learned JC; and we grant order in terms of prayer (1) in encl. 15.

Rhodzariah Bujang JCA (dissenting):

[43] The appellant, a lawyer was sued in the High Court of Shah Alam by the respondent (his former employer) which is a legal firm, for RM1,646,000 being loans given to him to facilitate the latter's foray into the motor insurance industry. This was the specific reason for the appellant's engagement by the respondent based on an understanding that the appellant had a vast experience in the said area. However, the respondent claimed that the appellant's failure to perform the tasks assigned to him caused it to suffer losses in the amount as claimed. Thus, the filing of the writ and statement of claim on 6 October 2015 for the said sum as well as general damages, interests thereon and costs.

[44] That writ and statement of claim were served on the appellant by way of AR registered post on 1 December 2015. The appellant failed to enter appearance within the requisite time stipulated by O. 12 r. 4(a) of the Rules of Court 2012 ("ROC") and a memorandum of non-appearance was accordingly filed on 18 January 2016. Pursuant thereto, a judgment in default dated 18 January 2016 was entered against the appellant. The appellant applied by way of a notice of application dated 23 February 2018 to set aside the said judgment before the learned Senior Assistant Registrar but failed, and the same result was repeated in his appeal to the judge in chambers. Premised on the said judgment, the appellant was made a bankrupt on 7 April 2017 by the Shah Alam High Court in case No. BA-29NCC-4273-05-2016. Subsequently, he also obtained a sanction from the Director General of Insolvency on 3 May 2019 to proceed with his appeal before us against the decision of the learned Judicial Commissioner ("JC"). The appellant succeeded in his appeal but it was by a majority decision for I dissented. My reasons for doing so are simply these.

The Law On Setting Aside A Judgment In Default

[45] It is trite that the law on this is determined firstly by the type of the judgment in default. If it is an irregular judgment such as when service of the writ and statement of claim have not been properly effected as required by O. 10 of the ROC, then it must be set aside as of right, that is *ex debito justititae*. On the other hand, in order to set aside a judgment regularly obtained, a defendant must show that he has a defence on the merits. This is the law as laid out in *Kwong Yik Bank Bhd v. Sa'Adiah Mastan* [1992] 1 LNS 52; [1994] 2 MLJ 830, following the principle in *Evans v. Bartlam* [1937] BC 473. This substantive requirement of law is preceded by a procedural one as provided in O. 42 r. 13 of ROC which prescribes a time limit of thirty days from the receipt of the judgment for the application to set aside the said judgment be made.

[46] In other words, this timeline is the first hurdle a defendant must overcome. It is an undisputed fact that the appellant only filed his application to set aside the judgment about two years one month and 22 days after it was entered. It was obvious from the relevant dates I had given earlier that this application of the appellant was only filed after the receiving and adjudication order had been made against him and that too after a lapse of about ten months from the said order. With respect, I am of the view that the appellant did not act with the promptitude demanded of the situation for even if I were to accept his allegation (which I do not) that he never received the writ and statement of claim, there was just no given, let alone an acceptable explanation, deposed in his affidavit why he waited so long to act even after being made a bankrupt for the judgment debt. Given that the time line stipulated under the said O. 43 r. 13 is mandatory since the word used is 'shall' as decided by this court in *Perbadanan National Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, the court has no discretion to excuse its non-compliance unless the appellant files an application for extension or abridgment of time. Since there was no such application filed, the indolence of the appellant is in my view, fatal to his application.

[47] Furthermore, I am of the like mind with the learned JC that the appellant had not satisfied the court that he had not received the writ and statement of claim. The learned JC, as did the respondent's counsel before us, have rightly highlighted that the place where the service was effected was the appellant's last known address. The appellant did not dispute that. His only complaint as verbalised by his counsel was that it was not personally acknowledged receipt by him but by one Pemalu a/l Kerishnan. However, I noted that in his affidavit in support of the application affirmed on 4 May 2017 at para. 5 thereof, all that the defendant said was that the service was not in accordance with the ROC. The said para. 5 reads:

> 5. Saya mengatakan bahawa, Writ Saman Plaintif tidak diserahkan kepada saya mengikut Kaedah-kaedah Mahkamah 2012. Maka penghakiman ingkar adalah cacat dan wajar diketepikan dan juga bahawa perintah kebankrapan bertarikh 6.4.2017 adalah cacat juga.

[48] This court in *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175; [2008] 5 MLJ 112 has held that it was not necessary for the defendant to personally receive the writ and statement of claim in order for the service of the said documents to be proper. Paragraph 20 of the said judgment reads:

> [20] In this instance, the plaintiffs had elected to serve the writ and statement of claim on this defendant by way of sending it by prepaid AR registered post. This defendant did not challenge that such process was never undertaken. Once this process was carried out, it is our view that there is no provision in law to say that the plaintiffs must also prove that the person so named in the post had received it. This opinion is shared

by Suriyadi Halim J (as he then was) when he said in *Pengkalan Concrete Sdn Bhd v. Chow Mooi (guarantor of Kin Hup Sent Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67, at p 73:

> In fact under sub-r. 1(1) of the O 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie, if it was sent by prepaid AR registered post. I therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being "Yanti" (not the name of the defendants) did not vitiate that service.

[49] I am in agreement with the view expressed above and with the learned JC that the service of the said writ and statement in this case was proper. Therefore the judgment in default was a regular judgment and in order to set it aside, the appellant must show that he has a defence on the merits in the affidavit that he filed in support of his application to set aside the said judgment. Having said that I must acknowledge the fact that there is a contrary decision of this court in *Chung Wei Meng v. Perbadanan Nasional Berhad* (Civil Appeal No. W-02(IM)-1216-07-2016 and W-02(IM)1217-07-2016) which held that since our O. 10 r. 1(1) of the ROC is silent on whether the person served must acknowledge the service of the writ and statement of claim on the receipt card as decided in *Teskey v. Paz* [1999] OJ No. 4977, then the named recipient must acknowledge receipt of the service of the said documents in order for the service to be proper. In coming to the said decision, Yeoh Wee Siam J (delivering judgment of the court) considered not just the said Canadian case but that of the Singapore High Court in *Ho Miaw Ling v. Singapore Island Country Club* [1997] 1 SLR (R) 276 which held that the AR card must be produced as proof that service was effected but which was not done in the said case. The Singapore court held that:

> ... The evidence shows that whether the notice was delivered or otherwise, the AR card would be returned to the sender. **If it was delivered the card would bear the signature of the recipient or someone at the address**; if not the card would indicate why it was not delivered. (emphasis added)

Thus, it is clear that from the statement above that an acknowledgement of the service by one other than the defendant at his address is allowed.

[50] In respect of the Canadian case, I noted that the relevant Ontario Rules of Civil Procedure that is r. 16.03(4) as reproduced in Her Ladyship's judgment specifically provides for the acknowledgement of service by the intended recipient as highlight below:

> 16.03(4) Service of document may be made by sending a copy of the document together with an acknowledgement of receipt card (Form 16A) by mail to the last known address of the person to be served, but **service by mail under this subrule is effective**;

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(a) **only if the acknowledgement of receipt card or a post office receipt bearing a signature that purports to be the signature of the person to be served is received by the sender**; and

(b) on the date on which the sender first receives either receipt, signed as provided by clause ... (emphasis added).

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[51] Thus, with respect, given that specific provision in the said rules and the absence of it in our ROC as well as the omission to exhibit the AR card in the said Singapore case and its production in this case before us, I am more inclined to agree with the earlier decision of this court in *Yap Kee Huat*'s case (*supra*).

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Defence On Merits

[52] In his affidavit in support affirmed on 4 May 2017 and 16 May 2017, the appellant at paras. 6, 7 and para. 12 thereof respectively, deposed the reasons why he believed the judgment in default should be set aside which

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in summary is that the claim for the said sum was fraudulent and there was concealment of material facts. Given my earlier decision to hold the issue of delay in filing the application against the appellant, I propose not to delve into the merits of the proposed defence and this decision I make is compounded by another omission of the appellant, which was his failure to

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exhibit his proposed defence to his affidavit.

[53] I am fully aware that the ROC did not expressly provide that such a document be produced but from my experience on the Bench, it always had been in an application such as this. That, in my view, is a salutary practice for sighting the document breeds certainty on what the proposed defence

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would be – not just guesswork from the complaints levelled against the claim deposed in the affidavit in support of the application. I do believe that now is an opportune time to make the said practice mandatory.

[54] For all the reasons stated above, I have decided to dismiss the appeal and affirm the decision of the learned JC.

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